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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO ARROYO JR.,

Defendant and Appellant.

G055553

(Super. Ct. No. 15CF0669)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant was convicted of possession of a short-barreled shotgun (Pen. Code, § 33215; count 1),¹ possession of a firearm by a felon (§ 29800, subd. (a)(1); count 2), possession of a firearm within 1,000 feet of a school (§ 626.9, subd. (b); count 3), possession of a controlled substance (methamphetamine) for sale (Health & Saf. Code, § 11378; count 4), and street terrorism (§ 186.22, subd. (a); count 5). As to counts 1 through 4, the jury found the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1).) The court sentenced defendant to four years eight months in prison, computed as follows: two years on count 3, with an additional two years for the gang enhancement; a consecutive eight months (one-third of the midterm) on count 4; and concurrent sentences of two years on each of counts 1, 2, and 5.

On appeal, defendant contends there was insufficient evidence to support the jury's finding on counts 1 through 3 that he possessed a short-barreled shotgun. We disagree and affirm.

FACTS

On March 30, 2015, officers with the Santa Ana Police Department gang unit were approaching the area of 1210 West Brook Street when they observed defendant and three men standing between two parked cars. One car was a blue sports utility vehicle (SUV) and the other was a silver truck. There was about a four-foot space between the vehicles. Defendant and the other men were standing in a semi-circle and were all looking down "at something." As the officers approached the group, someone in the group yelled "jura," a Spanish slang word for police, and one of the men started running away. Defendant and another individual leaned down toward the front grille of

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All statutory references are to the Penal Code unless otherwise stated.

the SUV, stood up, and then walked away. As defendant walked away, he threw away a small plastic jar.

Police detained all four men and took them back to the area where they had originally been standing. One of the officers recovered the plastic jar defendant had thrown away and discovered that it contained three plastic bindles of a substance that was later determined to be methamphetamine. An officer searched the blue SUV and found a short-barreled, 12-gauge shotgun. The gun was wedged into the grille of the SUV, with five to six inches of its handle sticking out.

An officer spoke with defendant at the scene and defendant denied knowing anything about the small jar or the gun. Defendant told the officer, however, that in order to sell drugs in that neighborhood, a person had to be from that neighborhood gang or get permission from the Brook Street gang.

A gang expert testified that the Brook Street gang was an active criminal street organization whose “turf” surrounds Brook Street. The primary activities for members of the Brook Street gang involved narcotic sales and possession of firearms by ex-felons. The expert was familiar with defendant from a prior 2013 contact in which defendant was with six other Brook Street gang members and was wearing their gang colors. Based on his review of police reports and field interview cards that documented defendant’s conduct in various incidents, the expert opined that defendant was an active member of the Brook Street gang.

A forensic scientist analyzed a DNA swab taken from the shotgun and compared it to DNA samples taken from defendant and the three individuals who were detained with him. All four men were excluded as sources of the DNA. The analyst explained that it is possible for a person to handle an item and not transfer any DNA if, for example the person’s hands are dry or if they touched the item for less than 30 seconds.

DISCUSSION

Defendant raises a single, straightforward issue: Did the evidence support a finding that defendant possessed the shotgun? Both parties agree we review this issue for substantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

There are two types of possession. “A defendant has *actual* possession when the weapon is in his immediate possession or control. He has *constructive* possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others.” (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052, italics added.) “Possession may be shared with others. [Citation.] But mere proximity to the weapon, standing alone, is not sufficient evidence of possession.” (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (*Sifuentes*), disapproved on other grounds by *People v. Farwell* (2018) 5 Cal.5th 295.) The People contend defendant constructively possessed the shotgun; defendant disagrees, relying heavily on *Sifuentes*, a case decided by this court.

In *Sifuentes*, as here, the issue was whether defendant constructively possessed a firearm. (*Sifuentes, supra*, 195 Cal.App.4th at p. 1417.) The police had executed a warrant on a motel room, where the defendant and a fellow gang member were found. The defendant was lying on the bed nearest the door. The fellow gang member knelt on the floor near a second bed, his right hand reaching down under the mattress where, it was later discovered, a firearm was located. (*Id.* at p. 1414.) We held this was insufficient to establish that the defendant was in constructive possession of the firearm. (*Id.* at p. 1419.) The only evidence the People relied on was expert testimony concerning the nature of a “gang gun,” and in particular that such guns were “‘accessible’ to gang members ‘at most times.’” This testimony, without more, was insufficient to establish that the defendant had the right to control the firearm at the moment the police arrested the defendant. (*Id.* at pp. 1417-1418.)

The evidence here was significantly stronger than in *Sifuentes*. Here, the jury could conclude that defendant and an associate picked up the shotgun and stuffed it into the grill of a car in an effort to hide it. Moreover, unlike *Sifuentes*, defendant was engaged in selling drugs for the benefit of his gang, an activity that would typically involve the possession of a firearm for protection. (See *People v. Bland* (1995) 10 Cal.4th 991, 1005 [“Drug dealers are known to keep guns to protect not only themselves, but also their drugs and drug proceeds; ready access to a gun is often crucial to a drug dealer’s commercial success”].) Finally, the investigating officers testified that all four individuals were standing in a semi-circle, glancing down at “something,” which the jury could infer was the shotgun. Unlike *Sifuentes*, therefore, where the defendant was simply lying on a bed and the gun was much closer to, and in the actual possession of, another gang member, here the evidence suggests all four gang members were exercising dominion over the shotgun, and especially the two gang members, including defendant, who stuffed the shotgun into the grille of the car. In other words, in *Sifuentes* the defendant’s relation to the gun was mere presence. Here, there was evidence defendant exercised control or dominion over the gun, which supports the jury’s finding that defendant possessed the shotgun.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.